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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re SERENA Z., a Person Coming Under  
the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND  
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

JIMMIE S.,

Defendant and Appellant.

D049953

(Super. Ct. No. J515921)

APPEAL from an order of the Superior Court of San Diego County, Julia Craig  
Kelety, Judge. Affirmed.

Jimmie S. appeals an order denying his Welfare and Institutions Code section  
388<sup>1</sup> modification petition. We affirm the order.

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<sup>1</sup> All statutory references are to the Welfare and Institutions Code.

## FACTUAL AND PROCEDURAL BACKGROUND

Serena Z., born in June 2005, was removed from the custody of her mother, J.Z., when she was one month old.<sup>2</sup> The San Diego County Health and Human Services Agency (Agency) filed a petition alleging Serena was at serious risk of harm because of her mother's dual diagnosis of paranoid schizophrenia and methamphetamine addiction. (§ 300, subd. (b).)<sup>3</sup> J.Z. informed the social worker that Serena's father might be Jimmie or L.M.

On August 17, 2005, the court made a true finding on the petition and ordered paternity testing. At the disposition hearing, the court removed Serena from J.Z.'s custody and placed her in the care of her maternal grandmother, who was the legal guardian of Serena's older half-sister.

At a special hearing on October 11, 2005, the court found that Jimmie was Serena's biological father and appointed counsel for him. The court authorized supervised visitation and gave the social worker the discretion to offer Jimmie reunification services.

In October, November and December 2005, Jimmie telephoned the Agency and left messages seeking visitation with Serena. The social worker returned his calls at the

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<sup>2</sup> J.Z. is not a party to this appeal and is mentioned only when relevant to the issues raised in this appeal.

<sup>3</sup> The Agency also filed a count under section 300, subdivision (g), alleging the whereabouts of the parents were unknown but that count was dismissed by the court.

telephone numbers he provided. In December, the social worker left a message asking Jimmie to come to Agency offices to meet with her any time between 8:00 a.m. and 5:00 p.m. on December 12. Jimmie did not telephone or come to the office. Jimmie telephoned the social worker in February and March 2006, again leaving messages. On March 21, Jimmie met with the social worker. He appeared interested in Serena and her well-being, and expressed a desire to visit Serena and be "a part of her life." According to the social worker, Jimmie did not request reunification services and approved Serena's placement with her grandparents. Jimmie started visiting Serena on March 27.

On May 11, 2006, at the six-month review hearing, the court terminated J.Z.'s reunification services and set a hearing under section 366.26 to select and implement a permanency plan for Serena.

In reports prepared for the section 366.26 hearing, the Agency recommended the court terminate parental rights and free Serena for adoption by the maternal grandparents. Serena was happy, healthy and well adjusted. She appeared to be bonded and attached to her grandparents and older sister. Jimmie visited Serena each week. He sang to Serena, played with her, and tried to teach her math by writing simple equations on a blackboard. The supervising staff sharply criticized his teaching efforts as age-inappropriate. Jimmie did not think to change Serena's diaper without prompting. Staff also instructed Jimmie how to properly hold a bottle while feeding Serena. In the middle of one visit with Jimmie, Serena picked up her diaper bag, walked toward the door and said, "Bye bye."

On September 18, 2006, Jimmie filed a section 388 petition for modification of the order referring the matter to a section 366.26 hearing. He asked the court to place Serena

with him as the noncustodial parent under section 361.2, return custody to him under section 366.21, subdivision (e), or extend the reunification period for six months.

Hearings on the modification petition and permanency plan were held on October 20 and October 31, 2006. The social worker acknowledged Jimmie did not have a history of drug use or domestic violence. From her observations, she believed Jimmie did not know how to parent a young child. Jimmie was a "friendly visitor" to Serena, who was too young to understand who he was. Serena was attached and bonded to her grandparents, and to her sister. The social worker believed it would be highly detrimental to Serena to remove her from the grandparents' home.

Jimmie testified he had stabilized his housing situation and now wanted custody of Serena. He was attending a parenting class he found on his own. Jimmie worked part-time as a handyman. He received veterans' benefits and social security disability for a heart condition. Jimmie wanted what was best for Serena. Earlier in the proceedings, he believed it was best for Serena to stay with her grandparents because his living situation was not stable. Jimmie did not want to separate Serena from her grandparents and sister, and suggested Serena could stay with them on weekends and overnight visits.

The court found that Jimmie loved Serena and was concerned about her well-being. Although his housing situation was now more stable, Jimmie did not demonstrate an improvement in his ability to properly care for a young child. In addition, Jimmie did not show that it was in Serena's best interests to be removed from her grandparents and sister. The court denied the modification petition, found Serena was adoptable and terminated parental rights.

## DISCUSSION

Jimmie contends the court abused its discretion when it denied his modification petition. He argues he established a change of circumstances by obtaining appropriate housing and improving his parenting skills. Relying on the factors set forth in *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 528, Jimmie asserts the evidence shows it was in Serena's best interests to modify the prior orders.

Under section 388, subdivision (a), a parent, interested person, or the dependent child (generically, petitioner) may petition the court to change, modify, or set aside a previous order on the grounds of changed circumstances or new evidence. (§ 388, subd. (a).) The petitioner requesting the modification has the burden of proof to show a change of circumstances or new evidence, and that the proposed modification is in the child's best interests. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415.)

We review the grant or denial of a petition for modification under section 388 for abuse of discretion. (*In re Shirley K.* (2006) 140 Cal.App.4th 65, 71; *In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) Although the abuse of discretion standard gives the trial court substantial latitude, "[t]he scope of discretion always resides in the particular law being applied, i.e., in the 'legal principles governing the subject of [the] action . . .'" (*Nickolas F. v. Superior Court* (2006) 144 Cal.App.4th 92, 119, citing *City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297.) The focus of a petition for modification under section 388, subdivision (a) is whether the petitioner has shown a legitimate change of circumstances.

The court did not abuse its discretion when it determined Jimmie did not show changed circumstances. After the court determined paternity, Jimmie did not visit Serena for five months. Although Jimmie faults the Agency for not responding to his inquiries, the record shows the social worker promptly responded to Jimmie's telephone calls, and left messages as he instructed. Jimmie chose not to participate in services. The court found it significant that Jimmie did not know how to hold Serena's bottle and did not think to change Serena's diaper, simple and routine elements of childcare. Jimmie did not show he substantially improved his ability to parent Serena since the six-month review hearing.

Even had Jimmie established changed circumstances, the court acted within its discretion when it determined that modifying the prior order was not in Serena's best interests. In considering a child's best interests, the court considers many complex factors and does not reduce the analysis to a comparison of the parent's and caretaker's households. (*In re Kimberly F.*, *supra*, 56 Cal.App.4th at p. 531.) The court in *In re Kimberly F.* suggested these factors include the seriousness of the reason for the dependency, the reason the problem was not remedied sooner in the proceedings, the relative strength of the child's bonds to the parent and caretaker, the length of time the child had been in out-of-home placement, and the nature of the change in circumstances. (*Id.* at pp. 530-532.)

Here, Jimmie did not have an established relationship with Serena's mother and did not know he was Serena's father until she was four months old. At the time paternity was established, Jimmie was living in motels and believed it would not be in Serena's

best interests to leave a stable home to live with him. He was ambivalent about seeking custody, and recognized the benefits of Serena's established relationships with her grandparents and sister. Jimmie did not seek reunification services. If, as he asserts, he did not seek services because of a misunderstanding or miscommunication with the social worker, Jimmie did not ask his attorney or the court to clarify his rights and responsibilities. The record shows the social worker promptly responded to his messages, scheduled appointments to meet with him, and discussed his participation in the dependency proceedings.

The court found that Jimmie loved and cared for Serena, and wanted the best for his child. By the time of the hearing on the modification petition, Serena was 16 months old and had lived with her grandparents and sister since she was two months old. The social worker testified Serena was bonded with her grandparents and sister, and removal from their home--her home--would be highly detrimental to her. Although Serena had friendly weekly visits with Jimmie, and tolerated his math lessons remarkably well for a one year old, the court could reasonably determine it was not in Serena's best interests to be removed from her loving and competent caretakers and separated from her older sister. The court did not err when it denied Jimmie's petition to modify the order setting a permanency plan hearing under section 366.26.

DISPOSITION

The order is affirmed.

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McDONALD, J.

WE CONCUR:

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McCONNELL, P. J.

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IRION, J.